

No. 05-412 2005

**In The
Supreme Court of the United States**

HARRY TROY SMITH,

Petitioner,

v.

**BENJAMIN ANDERS OLSSON and
LARA KATHERINE OLSSON,**

Respondents.

**On Petition For A Writ Of Certiorari
To The Court Of Appeals,
Fifth District Of Texas At Dallas**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the due process component of the Fourteenth Amendment's equal protection clause permits a state to terminate a father's parental rights on the ground that the father's prior criminal conviction later endangered the child, when the father committed a crime in 1999, began serving his sentence shortly after the child's conception in 2000, became a model citizen after his release from incarceration in 2001, learned he had a child in 2002 and was terminated in 2003 based on his 1999 criminal act.

PARTIES

The petitioner is Harry Troy Smith. The respondents are Benjamin Anders Olsson and wife, Lara Katherine Olsson.

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OPINIONS BELOW

The December 2, 2004, decision of the Court of Appeals of the Fifth District of Texas, which is reported at 152 S.W.3d 200 (Tex. App. 2004), is reprinted in the Appendix to the petition. (App. 1-14). The May 13, 2005, decision of the Texas Supreme Court, denying petition for review, which is not officially reported, is reprinted in the Appendix to the petition. (App. 19). The July 1, 2005, decision of the Texas Supreme Court, denying motion for rehearing, which is not officially reported, is reprinted in the Appendix to the petition. (App. 20). The October 15, 2003, decision of the 305th Judicial District Court of Dallas County, Texas, which is not officially reported, is reprinted in the Appendix to the petition. (App. 15-18).

STATEMENT OF JURISDICTION

The Texas Supreme Court denied a timely filed petition for review on May 13, 2005. (App. 19). The Texas Supreme Court denied a timely filed motion for rehearing on July 1, 2005. (App. 20). The jurisdiction of this Court rests on 28 U.S.C. § 1257.

STATUTE INVOLVED

Section 161.001 of the Texas Family Code (Vernon 2002) is reprinted in an appendix to the petition. (App. 21-25).

STATEMENT OF THE CASE

Petitioner Harry Troy Smith ("Mr. Smith") seeks review of the termination of his parental rights to Jamie Lynn Grace Wyrick ("Grace") at the behest of Benjamin and Lara Olsson ("Dr. Olsson" and "Ms. Olsson" or "the Olssons"), who are the intended adoptive parents of the child. Grace's biological mother is Deanna Wyrick ("Ms. Wyrick"). Ms. Wyrick relinquished her parental rights to Grace and is not a party to this proceeding.

The facts pertinent to this case originate in the 1990s when Mr. Smith began keeping disreputable company. One day, Mr. Smith and some friends flew from Dallas to El Paso, Texas, where one of Mr. Smith's then-acquaintances suggested that Mr. Smith smuggle some cocaine through the El Paso airport on his way back to Dallas. Mr. Smith attempted to walk the cocaine through the El Paso airport on May 19, 1999, by tucking it underneath his clothes at his lower back. Federal authorities apprehended Mr. Smith after searching him when the airport metal detector signaled. They arrested Mr. Smith for possession of a controlled substance with intent to distribute in excess of 500 grams. On February 23, 2000, after receiving Mr. Smith's guilty plea, the court sentenced Mr. Smith to thirty months, including six months in federal boot camp, twelve months in a halfway house and twelve months of home confinement. The court gave Mr. Smith a surrender date of May 15, 2000.

Not long before his surrender date, in March 2000, Mr. Smith began dating Ms. Wyrick. Ms. Wyrick was a cocaine user. On occasion, Mr. Smith drove Ms. Wyrick to pick up cocaine. Although Mr. Smith was about to go to boot camp, Mr. Smith and Ms. Wyrick decided they would

get married. They discussed having a child together, but they had unprotected sex on only three occasions. Mr. Smith and Ms. Wyrick broke up about two weeks before Mr. Smith reported to boot camp.

As it turned out, Ms. Wyrick had become pregnant by Mr. Smith. However, Mr. Smith did not know that Ms. Wyrick had become pregnant. Ms. Wyrick did not realize she had become pregnant until about six or seven months into the pregnancy. Ms. Wyrick delivered Grace on December 15, 2000.

After being released from boot camp, Mr. Smith completed his stay at the halfway house. He subsequently was released from community supervision eleven months early because of his good behavior and stable lifestyle. Once out of the halfway house, Mr. Smith needed somewhere to live. He contacted Jan Murphy, a Dallas-area real estate agent whom he had known prior to his incarceration. Ms. Murphy rented a room in her house to Mr. Smith. Over the next several months, Mr. Smith and Ms. Murphy fell in love. Mr. Smith still did not know he had a child.

Eventually, on May 22, 2003, Mr. Smith and Ms. Murphy (now "Ms. Smith") married. In the meantime, immediately after Grace's birth on December 15, 2000, the Texas Department of Community and Protective Services ("CPS") became involved with Grace and Ms. Wyrick because Ms. Wyrick admitted to using cocaine during the pregnancy, had a "long history of drug abuse," and Grace had been born prematurely. Ultimately, Respondents Dr. Olsson (who is Ms. Wyrick's half brother) and his wife agreed to accept the care of Grace.

Dr. and Ms. Olsson filed a petition to terminate the parental rights of Mr. Smith and Ms. Wyrick on July 18,

2002, in the 305th Judicial District Court of Dallas County, Texas. Ms. Wyrick relinquished her parental rights by affidavit filed August 14, 2002. The district court terminated Ms. Wyrick's parental rights that same day. The district court appointed the Olssons as temporary managing conservators of Grace in its Interlocutory Decree of Termination.

Ms. Wyrick identified Mr. Smith as Grace's father in an Affidavit of Status filed August 14, 2002, but she had no address for him. Nevertheless, the Olssons located Mr. Smith and served him with process by mail. Upon receipt of that letter, in mid-August 2001, Mr. Smith learned, for the first time, that he had become a father.

Mr. Smith filed a pro se answer to the termination petition on September 4, 2002, in which he expressed his delight at learning he was a father. To confirm paternity, Dr. Olsson requested that Mr. Smith submit to a DNA test, a request with which Mr. Smith complied.

On October 7, 2002, having retained counsel, Mr. Smith filed a Counter-Petition to Establish Parentage. The Olssons allowed Mr. Smith to meet his daughter for the first time in November 2002, at NorthPark Mall in Dallas, Texas. This visit marked the first of six informal visits. After court hearings in late December 2002 and early January 2003, the district court granted Mr. Smith visitation with Grace every Saturday for four hours and every other Wednesday night for two and one-half hours.

After Dr. Olsson graduated from medical school in the Spring of 2003, he and Ms. Olsson moved to Little Rock, Arkansas, in June so that Dr. Olsson could begin his residency. The following month, Dr. and Ms. Olsson had a child of their own, on July 10, 2003. But the move put a

stop to the Smiths' weekly Saturday visits and alternate Wednesday visits with Grace. Visitation changed to alternating weekends, one in Little Rock, then one in Dallas. Mr. Smith's visitation time equaled six hours on Saturday and six hours on Sunday. That visitation schedule - with which Mr. and Ms. Smith faithfully complied - stayed in effect until the time of trial, which began October 7, 2003.

At trial, no one disputed that Mr. Smith had turned his life around. Mr. Smith testified that he had left behind his former lifestyle when he departed for federal boot camp in May 2000. Mr. Smith testified that he had "come to a very, very clear understanding" that his former lifestyle was "not normal" and that he had been "messing up quite a bit." Mr. Smith repeatedly expressed contrition over his criminal conduct. He testified that he had "made a mistake." Further, "I can't even begin to tell you the ignorance of that." "I take responsibility for my actions." Even the Olssons' attorney conceded that Mr. Smith had cleaned up his life. Several witnesses testified to Mr. Smith's good character; none testified against him. The clinical psychologist retained by the Olssons testified he had found nothing to indicate that Mr. Smith would put his daughter "in any type of danger."

Mr. Smith's conduct since his 2000 stay in federal boot camp proved unblemished; the Olssons accordingly turned their attention to Mr. Smith's wife Jan Smith, the former Jan Murphy with whom Mr. Smith had fallen in love before he even knew he had become a father and whom he later married. The Olssons accused Ms. Smith of alcoholism. To support this allegation, they called Ms. Smith's daughter, Sherry Spillman ("Ms. Spillman"), as a witness. Ms. Spillman characterized her mother as an alcoholic and

said that she had been an alcoholic as far back as Ms. Spillman could remember. Ms. Spillman described her mother's drinking thus: "Just random. I mean, different times. I mean, no set, certain time." Ms. Spillman, who was forty-one years of age at the time of trial, remained angry with her mother for drinking on her birthday nearly a generation ago, when Ms. Spillman was twelve or thirteen years old. Ms. Spillman also testified that Ms. Smith hit her, her sister, or Ms. Smith's then-husband in 1971 and also "held her father at gunpoint." Ms. Smith and her former husband divorced in 1991 or 1992. Ms. Smith admitted to having some problems with alcohol during that marriage and through that divorce; Ms. Smith testified that her then-husband had been abusive to her. But even Ms. Spillman conceded that she knew of nothing Ms. Smith had done to jeopardize Grace. The Olssons did not claim that Ms. Smith ever had used alcohol or been under its influence when she and Mr. Smith visited Grace.

The Olssons and Mr. Smith – by this time pro se again, for lack of funds – tried the case to a jury. The jury concluded that Mr. Smith had engaged in conduct that endangers the physical or emotional well-being of a child and that termination of Mr. Smith's parental rights to Grace would be in Grace's best interest, as set forth in Texas Family Code section 161.001. (App. 21-25). The district court accordingly signed Judgment on the Verdict of the Jury. (App. 15-18). In his Motion for Judgment Non Obstante Veredicto, Mr. Smith raised the constitutional issues he would have this Court decide. (App. 28-29). The district court denied this Motion on January 8, 2004. (App. 31). The Court of Appeals of the Fifth District of Texas affirmed the district court but did not mention any constitutional issues. (App. 1-14). The Texas Supreme Court

denied Mr. Smith's Petition for Review and his Motion for Rehearing without comment. (App. 19, 20).

At trial, Mr. Smith asked Dr. Olsson, a pediatric resident, "How am I supposed to compete with you?" "How is anybody supposed to keep their children if they have to compete against you?" That plaintive cry – and the practice of terminating parental rights to allow placement with a "better" family – form the basis for this petition for certiorari.

REASONS FOR GRANTING THE PETITION

This Court long has recognized that the liberty interest of parents "in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (citing *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923)). This liberty interest may not be taken without due process of law, both procedural and substantive. *E.g.*, *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Quilloin v. Walcott*, 434 U.S. 246 (1978). For these reasons, the Fourteenth Amendment's due process component requires that parental rights may be terminated only upon proof of facts warranting termination by clear and convincing evidence. *Santosky v. Kramer*, 455 U.S. 745 (1982).

Texas' statute permits termination of parental rights when a parent has "engaged in conduct . . . which endangers the physical or emotional well-being of the child" and "termination is in the best interest of the child." Tex. Fam. Code §§ 161.001(1)(E) & (2) (App. 21, 25). In construing